No. 9397

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED CIGAR-WHELAN STORES CORPORATION (a corporation), and EDGAR DEHNE,
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANTS.

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Subject Index

Table of Authorities Cited

Cases

Statutes

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BRIEF FOR APPELLANTS.

This is an action for alleged violations of 26 U.S.C.A. 1152a and 1397(a) (1) and 27 U.S.C.A. 85.*

The appellants were convicted in the District Court of the United States for the District of Montana, by the verdict of a jury on all counts of an indictment containing twenty-two counts, District Judge James H. Baldwin presiding.

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*The sections of Title 26 of the U.S.C.A. above set forth had been repealed February 10, 1939, prior to the time of the alleged violations and at the time of the alleged violations, the time of trial, and now, are, respectively, Secs. 2803(a) and 3253 of the Internal Revenue Code. However, we believe that the indictment and trial and conviction under statutes, at none of said times in force, constituted harmless error, as identical or similar provisions appeared in the Internal Revenue Code. While the statutes in question are actually the sections of the Internal Revenue Code above cited, to eliminate confusion we will refer to the former sections of Title 26 of the U.S.C.A., as the entire record refers to those sections of Title 26.

BASIS OF JURISDICTION OF UNITED STATES DISTRICT COURT AND OF UNITED STATES CIRCUIT COURT OF APPEALS.

The crimes of which the appellants were accused, and for which they were convicted and sentenced, are created by 26 U.S.C.A. 1152a and 1397(a) (1) and 27 U.S.C.A. 85. Under the provisions of 28 U.S.C.A. 371 (Jud. Code, Sec. 256, amended), the courts of the United States are given exclusive jurisdiction of offenses cognizable under the authority of the United States, and under 28 U.S.C.A. 41 (Jud. Code, Sec. 24, amended), the district courts are given original jurisdiction of all such crimes and offenses.

The jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit arises under 28 U.S.C.A. 225(a) First and (d) (Jud. Code, Sec. 128, amended), and upon the timely compliance by appellants with the provisions of law and rules of the Supreme Court issued under 28 U.S.C.A. 723(a). The judgment of conviction was entered on November 20th, 1939 (R.* p. 221). On November 20th, 1939, the appellant Edgar Dehne served on the United States Attorney and filed with the clerk of the trial court, a notice of appeal (R. pp. 35, 235) and bail bond (R. p. 38). On November 21st, 1939, the appellent United Cigar-Whelan Stores Corporation served on the United States Attorney and filed with the clerk of the trial court a notice of appeal (R. pp. 42, 235) and bond guarantying payment of fines and penalties and cost bond (R. p. 45). On November 28th, 1939, the appellants procured to be settled and filed with

*Refers to printed Transcript of Record.

the clerk of the court a bill of exceptions setting forth the proceedings upon which the appellants wish to rely, in addition to those shown by the clerk's record of proceedings as described in Rule 8 of the United States Supreme Court "Rules of Practice and Procedure After Verdict in Criminal Cases Brought in District Courts of the United States." On November 28th, 1939, appellants also filed an assignment of the errors of which they complain. The bill of exceptions was settled by the trial judge on December 19th, 1939 (R. pp. 237-238). Thereafter, the clerk of the trial court transmitted the transcript of record upon appeal, including indictment, clerk's record of proceedings, record of trial, bill of exceptions and assignment of errors, to the clerk of this court, and said transcript of record was received and filed by the clerk of this court on December 29, 1939 (R. p. 251).

STATEMENT OF THE CASE.

Appellants were convicted of violations of 26 U.S.C.A. 1152a and 1397(a) (1), and 27 U.S.C.A. 85, the violation of said Section 85 consisting of a violation of a regulation of the Commissioner of Internal Revenue issued under the authority given him by 27 U.S.C.A. 83.

The indictment contains twenty-two counts, comprising four groups, summarized as follows:

(1) The first count alleges that the appellants carried on the business of retail liquor dealers without having paid the special tax required by law (R. pp. 3-5).

(2) The next ten counts allege that the appellants sold articles in the manufacture of which denatured alcohol was used, under circumstances from which they might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of a regulation of the Commissioner of Internal Revenue (Article 146-A, Regulations No. 3, as amended) (R. pp. 5-15).

(3) The next ten counts allege that the appellants sold articles in the manufacture of which denatured alcohol was used, under circumstances from which they might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, and that the sales were made in containers to which there was affixed no stamp evidencing payment of all Internal Revenue taxes imposed on the articles (R. pp. 15-27).

(4) The last count alleges that the appellants possessed articles in the manufacture of which denatured alcohol was used, with the intention of selling them under circumstances from which they might reasonably deduce that it was the intention of the purchaser to procure the same for use for beverage purposes (R. pp. 28-29).

The alleged offenses all occurred between March 9th, 1939 and April 15th, 1939. The counts of the indictment alleging a violation of the regulation of the Commissioner of Internal Revenue issued under the authority given him by 27 U.S.C.A. 83 (being counts 2 to 11 inclusive), and the count alleging a

violation of 26 U.S.C.A. 1397(a) (1) (being count 1), all described sales by the appellants to one Julius N. Johnson. The remaining counts do not name Julius N. Johnson as the purchaser, but it appears from the record, and it cannot be disputed, that the sales alleged in these counts were the same sales described in the prior counts (R. pp. 63-70).

At the trial of the action it appeared that Julius N. Johnson was an agent employed by the Alcohol Tax Unit of the Bureau of Internal Revenue (R. p. 62), that all purchases made by him were made solely to obtain evidence against the appellants (R. p. 81), and that he did not intend to and did not use any of the articles purchased by him for beverage purposes, nor were any of said articles used by anyone else for beverage purposes (R. p. 75, 81, 91). The only person who testified to the sales was agent Johnson. His testimony showed conclusively that he did not tell the clerks in the store he was purchasing the alcohol for beverage purposes, except at the times of the last two sales on April 15th, 1939, these sales being the ones set forth in counts 10, 11, 20 and 21. It further appeared that appellant United Cigar-Whelan Stores Corporation was the employer of appellant Edgar Dehne (R. pp. 58, 142), and that only some of the sales in question, namely, those made on March 9th, 1939, at 4:25 and 5:25 P.M., and on March 10th, 1939, at 10:20 A.M. and 7:00 P.M., and described in counts 2, 3, 6, 9, 12, 13, 16 and 19 of the indictment, were made by Dehne, the other sales having been made by other employees of appellant United Cigar-Whelan Stores Corporation (R. pp. 63-70).

It also appeared that the principal business of appellant United Cigar-Whelan Stores Corporation was the sale of cigars, cigarettes, pipe tobacco, pipes, and chewing gum, and that it also sold face lotions, perfumes, shaving soap and lotions, bay rum and rubbing alcohol (R. p. 154).

The principal question presented is whether sales to the agent of the Alcohol Tax Unit under the circumstances above set forth, neither such agent nor anyone else having used or intended to use the article sold for beverage purposes, constituted a violation of the regulation of the Commissioner of Internal Revenue above referred to. It is our belief that this question should be answered in the negative. If there was not a violation of this regulation, the government will undoubtedly concede that neither the Retail Liquor Dealers Special Tax provided by 26 U.S.C.A. 1397(a) (1), nor the strip stamps on the bottles containing the article sold provided for by 26 U.S.C.A. 1152a, were required, as there is no question but that this special tax and the strip stamps are not required when articles containing denatured alcohol are sold for proper purposes.

Appellants also contend:

(a) That the evidence was entirely insufficient to convict either of the appellants, except possibly as to the last two sales made on April 15th, 1939, which were made by Wilfred Maenpa, who was not a defendant in the action;

(b) That the action of the court in imposing sentences under each count of the indictment constituted

double punishment of the appellants, in violation of the Fifth Amendment to the Constitution of the United States;

(c) That appellant Dehne could not be convicted of carrying on the business of a retail liquor dealer, in violation of 26 U.S.C.A. 1397(a) (1), because it appeared that he was not the owner of the business in question but was merely an employee;

(d) That appellant Dehne should in no event have been convicted for more than four of the sales made; and

(e) That the court committed error in permitting the introduction in evidence of testimony inferentially indicating that the appellants were guilty of violations other than those set forth in the indictments.

SPECIFICATION OF ERRORS.

Appellants intend to rely upon the following assignments of errors: No. II, paragraphs Third, Fourth, Fifth, Sixth, Seventh (R. pp. 240-243), No. III (R. pp. 243-244), No. IV (R. p. 245), and No. VI, paragraphs Third, Fourth, Fifth, Sixth, Seventh (R. pp. 246-250).

THE GOVERNMENT FAILED TO PROVE A VIOLATION OF THE REGULATION OF THE COMMISSIONER OF INTERNAL REVENUE IN QUESTION (ART. 146-A, REGULATIONS NO. 3, AS AMENDED). THERE WAS NO EVIDENCE WHATSOEVER THAT THE PURCHASER OF THE RUBBING ALCOHOL, A GOVERNMENT AGENT, INTENDED TO OR DID, OR THAT ANYONE ELSE INTENDED TO OR DID, USE THE RUBBING ALCOHOL PURCHASED, FOR BEVERAGE PURPOSES, AND WITHOUT SUCH EVIDENCE IT IS IMPOSSIBLE TO HAVE A VIOLATION OF SAID REGULATION.

ASSIGNMENT OF ERROR II.

The court erred in denying and overruling the motion of the defendants for a directed verdict and a verdict of acquittal, and for the dismissal of the indictment, at the close of the Government's case, which motion was made upon the following grounds and for the following reasons:

* * * * * * *

Third, that the government has failed to prove the matters and things charged in the indictment, and in each count thereof, beyond a reasonable doubt, or by any credible evidence.

Fourth, that there is an insufficiency of the evidence introduced by the government to prove the matters and things charged in the indictment.

Fifth, that there is an insufficiency of the evidence to show that the defendants, or either of them, were guilty of the offense or offenses charged in the indictment, or in any count thereof.

Sixth, that regulation 4750, upon which all twenty-two counts are based, states that the seller must reasonably deduce that it is the intention of the purchaser to procure the same for use for beverage pur-

poses. That the purchaser in this case has testified in this case that it was not his intention to purchase it for beverage purposes, it being rubbing alcohol, but that he purchased the alcohol with the intention of using it as evidence, and never with the intention of drinking or selling it.

Seventh, there has been no proof that there has been a sale made of anything but rubbing alcohol; and there has been no proof that a Federal Stamp Tax or any Strip Tax, or any license is necessary for the sale of rubbing alcohol, and therefore counts number 1 and 11 to 21 inclusive should be dismissed. Further, that the only testimony offered on behalf of the government in the analysis of alcohol was to prove that it was rubbing alcohol, and the stamp and sales tax and the United States liquor license provided for by the statutes of the United States do not cover stamp or strip tax or liquor license for the sale of rubbing alcohol.

The evidence is insufficient in the following particulars: The Government failed to show that the defendant Edgar Dehne had any proprietory interest in the business of the United Cigar-Whelan Stores Corporation, a corporation, and there is no evidence to show that said Edgar Dehne was any more than an employee of said defendant corporation. The evidence does show that Dehne was manager of the corporation's store in Butte, Montana, and that the United Cigar-Whelan Stores Corporation, a corporation, is a corporation qualified to do and doing business in the State of Montana. The evidence is in-

sufficient and will not sustain a verdict against the defendant Edgar Dehne under count one of the indictment, which said indictment charges the defendants, United Cigar-Whelan Stores Corporation, a corporation, and Edgar Dehne with carrying on the business of a retail liquor dealer and wilfully failing to pay the special tax imposed by law. There is no evidence to show that the defendant Edgar Dehne was present in the defendant corporation's store at the time of any of the sales of rubbing alcohol as set forth in the indictment except four sales, namely, at 4:25 P.M. and 5:25 P.M. on March 9th, and 10:20 A.M. and 7 P.M. on March 10th, 1939. Therefore, the evidence will not sustain a verdict, and is insufficient against the defendant Edgar Dehne on the counts wherein other persons besides Dehne made the sales, and on any counts where the sales were made by others than Dehne for failure to have strip or stamp taxes on the bottles of rubbing alcohol. That each of the other times charged in the indictment the evidence shows other employees to have been on duty and to have made the sales. There is insufficiency of the evidence to prove facts and circumstances from which the defendant Dehne could reasonably deduce that the purchaser intended to use the alcohol for beverage purposes. The evidence was that the person who purchased the alcohol failed to have an intent to use the same for beverage purposes but purchased it with the intent to use it as evidence against the defendants. That the evidence fails to disclose that there has been any sale made of anything but rubbing alcohol and that there has been no proof that a Federal stamp

tax or strip tax or any license is necessary for the sale of rubbing alcohol.

There is no proof by competent evidence that the defendants, on April 16th, 1939, possessed any quantity of Wecol with the intention to use it in violation of the law as charged in count twenty-two.

ASSIGNMENT OF ERROR VI.

The court erred in denying and overruling the motion of defendants, United Cigar-Whelan Stores Corporation, a corporation, and Edgar Dehne for a directed verdict and a verdict of acquittal and for the dismissal of the action at the close of all the evidence in the case and after the witnesses for both sides had been permanently excused, which motion was made upon the following grounds and for the following reasons:

(Here follows (R. pp. 241-243) the balance of such assignment, commencing with paragraph third. Such portion is identical with the above-quoted portion of assignment II commencing with paragraph third thereof, and is not therefore repeated at this point.)

There was no evidence whatsoever that the purchaser of the rubbing alcohol, a government agent, intended to or did, or that anyone else intended to or did, use the rubbing alcohol purchased for beverage purposes, and without such evidence it is impossible to prove a violation of said regulation. The regulation of the Commissioner of Internal Revenue which it is alleged was violated, read as follows at the time of the alleged violations:

> "No person shall sell denatured alcohol, denatured rum, or any substance or preparation in the manufacture of which denatured alcohol or denatured rum is used, under circumstances from which he might reasonably deduce that it is the intention of the purchaser to procure the same for use for beverage purposes." (Art. 146-A, Reg. No. 3, as amended.)

It is clear that the regulation in question applies only to sales in which it is the intention of the purchaser to procure the articles in question for beverage purposes, and in which the circumstances under which the sales are made are such that the seller might reasonably have deduced the existence of that intention. Therefore, by virtue of the language of the regulation, two conditions must exist before there is a violation of the regulation in question—namely, the purchaser must intend to use the article for beverage purposes, and the circumstances under which the sale is made must be such that the seller might reasonably have deduced that this intention existed. If either of these conditions does not exist, the regulation has not been violated and no crime has been committed. This, it seems, is an entire answer to the claim of the government that the regulation has been violated, because it appears conclusively and without a question of a doubt that the purchaser, a government agent, at no time intended to use the articles for beverage purposes, and did not procure them with that intention.

The foregoing construction and application of an indistinguishable regulation was adopted by the

United States Circuit Court of Appeals for the Sixth Circuit, in the case of *Sherman v. United States,* 10 Fed. (2d) 17. In that case the appellant was convicted of violating the National Prohibition Act by the sale to a government agent of a bottle of Jamaica ginger. The provision alleged to have been violated provided that articles of the type in question were not subject to the provisions of the act, but further provided that:

> "Any person who shall knowingly sell (such preparations) for beverage purposes * * * or * * * under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for such purposes * * * shall be subject to the penalties (of this Act)."

Sherman was indicted on two counts, one for having knowingly sold the preparation for beverage purposes, and the other for having sold it under circumstances from which he should reasonably have deduced the agent's intention to use it for a beverage. At the trial, it appeared that the agent did not use the article purchased for a beverage and never intended to do so, but bought it for the sole purpose of turning it over to the officer for "evidential and not drinking purposes," and that this was done. The court stated that the sole question was whether the seller's guilty intent or knowledge of circumstances required by the statute above quoted, which could make him guilty, could be merely his independent purpose or conclusion, or whether it was also necessary to prove the purchaser's actual intent to use the article for beverage purposes. The court definitely held

a conviction could not be sustained in a case where the purchase had been made by a government agent and it was undisputed that the agent did not intend to use the article for beverage purposes, stating as follows (p. 18):

> "'This conclusion [that the circumstances were such as to indicate that the purchaser intended to use it for beverage purposes] leaves the conviction best supported, if supportable at all, by the 'circumstances from which' clause, and presents the question whether the seller's intent or reason to believe, which can make him guilty, may be merely his independent purpose or conclusion, or whether it can exist only as collateral to the purchaser's actual intent. We say that his conviction is best supported by the latter clause, because, as to the former, 'knowingly sell,' it is difficult to conceive knowledge of a thing which does not exist, while the 'circumstances under which' clause is, if read literally, open to be construed as wholly satisfied by the seller's state of mind. For a concrete example of this construction, we observe that, if a purchaser really needed the Jamaica ginger for medicine, and intended so to use it, and did so use it, but if his appearance or answers justified the inference that he probably wanted to drink it, the sale would be a crime by the seller. Did Congress so intend?
>
> The difference between such a sale and an ordinary one of intoxicating liquor is fundamental. The constitutional power is clear to prohibit broadly all sales of intoxicating liquor, whether for beverage purposes or not, provided suitable provision is made for such nonbeverage sales as are consistent with the purpose of the constitu-

tional amendment, and so we find section 3 (Comp. St. Ann. Supp. 1923, Sec. 10138½aa) containing a general and initial prohibition of all sales of intoxicating liquor. However, medicinal preparations are not within the ordinary definition of intoxicating liquor, and perhaps not within the definition of section 1 (Comp. St. Ann. Supp. 1923, Sec. 10138½), and to clear the doubt, if there is any, the first part of section 4 exempts them wholly from the operation of the act. Up to this point, the situation, then, is that the sale of what is commonly called intoxicating liquor is generally forbidden and the sale of these medicinal preparations is generally permitted. Thus the two transactions are approached from opposite viewpoints, and it would seem that the burden of establishing the exception is oppositely imposed.

It is contrary to the general principles of criminal law—except in conspiracy—that the mere intent to violate the law, not followed by actual violation, should be a crime. We think the ultimate thing at which this part of section 4 was aimed was such intoxication as might be caused through the purchase of these preparations by one who intended to use them to drink, and we conclude that participation by the seller in this actual intent by the purchaser furnishes the only reasonable basis for transforming the otherwise permitted sale into a prohibited one. It is the reasonable and consistent construction of this part of the statute to regard it as directed against those sales which were in fact for drinking purposes, and where the seller either knew or should have known this purpose. It follows that, unless the purchaser at the time of the purchase intends

> beverage use, there is no violation of law in which the seller can participate, either by direct purpose or by equivalent indifference and negligence.
>
> We get no helpful analogy from the numerous instances of a transaction by two parties, where the criminal intent of only one of them is held to be sufficient to make him guilty—like an acceptance of a bribe offered only as a test, or like the other familiar entrapment cases. In all of those the necessary intent of the respondent rests sufficiently upon the act done by him; in the present case the respondent's effective intent is, as we construe the statute, declared to rest, necessarily and only, upon the actual intent of the other party to the transaction."

In the case of articles containing denatured alcohol, as in the case of Jamaica ginger in the above cited case, the sale without payment of the internal revenue tax by a person who has not paid the special retail liquor dealers tax is generally permitted, and it is only where the sale actually accomplishes what the regulation and statute seek to prevent, namely, the use as a beverage of alcohol upon which the internal revenue tax has not been paid, that the regulation and statute have been violated and a crime has been committed.

If the government's contention that the actual intention of the purchaser is immaterial were correct, a sale for admittedly legal purposes, to a purchaser (not a government agent) who intended to and did use the article purchased for entirely legitimate purposes, might subject the seller to a prosecution for a

violation of the regulation, if, in the opinion of the government it appeared that the circumstances under which the sale was made were such that the seller "should have deduced" that it was the intention of the purchaser to procure the article for use for beverage purposes. It is submitted that the regulation in question does seek to prevent such sales, but only sales which result in the use of non-tax-paid alcohol for beverage purposes.

A provision somewhat similar to the regulation in question was under consideration in the case of *Bernstein v. State,* 199 Ind. 704, 160 N.E. 296. The statute in question, prohibiting the sale of intoxicating liquor, contained three classifications of such liquor, the first being all malt, vinous or spirituous liquor containing as much as one-half of one per cent of alcohol, the second, every other drink, mixture or preparation of like alcoholic content, whether patented or not, reasonably likely or intended to be used as a beverage, and the third, all other intoxicating beverages or preparations, whether alcoholic or not, intended for beverage purposes. The appellant was convicted under an indictment, one count of which charged that he did unlawfully manufacture, possess, transport, sell, barter, exchange, give away, furnish and otherwise dispose of, intoxicating liquor. On the trial it appeared that Nutter, a federal prohibition officer, went to appellant's place of business and represented that he was in business in Kokomo and that he wanted to use the malt extract in question in his poolroom, "to sell it as a beverage." It was stipulated that the malt extract in question contained 3.4% of

alcohol by volume. The Court of Appeals decided that the articles sold did not come under the first classification of the statute, and that the appellant could not be convicted unless the purchaser actually intended to use the articles for beverage purposes, stating (160 N.E. at p. 297):

> "But, if it be conceded that malt extract can be used as a medicinal tonic, and also that it is reasonably likely or intended to be used as an alcoholic beverage, its sale and use as medicinal tonic is as lawful as the sale of any other drug which contains a like amount of alcohol, while its sale for beverage purposes is as unlawful as the sale of any intoxicating liquor containing a like amount of alcohol. The evidence here is not sufficient to prove that appellant sold the malt extract for beverage purposes, and it is clear that it was neither purchased nor used for that purpose. The prohibition agent testified that he said that he wanted to sell it to his customers, and it appears that in fact he wanted it only to use as evidence in a prosecution in the United States District Court, and, failing in that, to use in this prosecution."

The above case goes even farther than we ask the court to go in the instant case, because in that case the statute obviously by its terms required only an intent on the part either of the seller or the purchaser. The testimony of the federal prohibition officer showed that the seller had the prohibited intent, but the court held that that was not sufficient and that it must also be shown that the purchaser had that intent. While the court did not so state, it undoubtedly

based its decision on the principle that the only sales which violate the act are those which actually accomplish what the act seeks to prevent, namely, sales which actually result in the use of the articles sold as a beverage. We submit that similarly, in the instant case, the regulation is violated only by a sale which accomplishes what the regulation seeks to prevent, namely, the actual use as a beverage of alcohol on which the tax imposed on beverage alcohol has not been paid.

THE EVIDENCE WAS INSUFFICIENT TO CONVICT APPELLANTS ON ANY COUNTS WHATSOEVER EXCEPT POSSIBLY THOSE ARISING OUT OF THE LAST TWO SALES MADE ON APRIL 15th, 1939.

ASSIGNMENT OF ERROR II.

The court erred in denying and overruling the motion of the defendants for a directed verdict and a verdict of acquittal, and for the dismissal of the indictment, at the close of the government's case, which motion was made upon the following grounds and for the following reasons:

* * * * * * *

Third, that the government has failed to prove the matters and things charged in the indictment, and in each count thereof, beyond a reasonable doubt, or by any credible evidence.

Fourth, that there is an insufficiency of the evidence introduced by the government to prove the matters and things charged in the indictment.

Fifth, that there is an insufficiency of the evidence to show that the defendants, or either of them, were

guilty of the offense or offenses charged in the indictment, or in any count thereof.

ASSIGNMENT OF ERROR VI.

The court erred in denying and overruling the motion of defendants, United Cigar-Whelan Stores Corporation, a corporation, and Edgar Dehne for a directed verdict and a verdict of acquittal and for the dismissal of the action at the close of all the evidence in the case and after the witnesses for both sides had been permanently excused, which motion was made upon the following grounds and for the following reasons:

* * * * * * *

Third, that the government has failed to prove the matters and things charged in the indictment, and in each count thereof, beyond a reasonable doubt, or by any credible evidence.

Fourth, that there is an insufficiency of the evidence introduced by the government to prove the matters and things charged in the indictment.

Fifth, that there is an insufficiency of the evidence to show that the defendants, or either of them, were guilty of the offense or offenses charged in the indictment, or in any count thereof.

* * * * * * *

The evidence is insufficient in the following particulars:

* * * * * * *

There is insufficiency of the evidence to prove facts and circumstances from which the defendant Dehne could reasonably deduce that the purchaser intended

to use the alcohol for beverage purposes. The evidence was that the person who purchased the alcohol failed to have an intent to use the same for beverage purposes but purchased it with the intent to use it as evidence against the defendants. That the evidence fails to disclose that there has been any sale made of anything but rubbing alcohol and that there has been no proof that a Federal stamp tax or strip tax or any license is necessary for the sale of rubbing alcohol.

There is no proof by competent evidence that the defendants, on April 15th, 1939, possessed any quantity of Wecol with the intention to use it in violation of the law as charged in count twenty-two.

The only witness who testified concerning the sales and the circumstances under which they were made was the agent, Julius N. Johnson (R. pp. 62-82, inc.). His testimony was in substance as follows:

When he made all the purchases he was dressed in old overalls, a shirt, an old sweater, a lumber jack mackinaw and slouch hat. In dressing in that manner he was attempting to simulate a "bum." On March 9th, 1939, he purchased one bottle of rubbing alcohol from appellant Dehne at 4:25 P.M., another from Dehne at 5:25 P.M., another at 7:25 P.M. from a clerk named Varco, and another at 8:25 P.M. from Varco. On March 10th, 1939, he purchased one bottle from Dehne at 10:20 A.M., another at 12:20 P.M. from Varco, another at 5:00 P.M. from Varco, and another at 7:00 P.M. from Dehne. On April 15th, 1939, he purchased one bottle at 9:15 A.M. from a clerk named

Walter Maenpa, and four bottles at 10:45 A.M. from Maenpa. At no time except on April 15th, 1939, did he say anything to the appellant Dehne or the other clerks except "Give me a bottle of alcohol," or "Give me another bottle of alcohol" (except to ask for other merchandise, such as cigarettes or snuff) (R. p. 68). There is no evidence that Johnson talked to or saw Dehne on April 15th, 1939.

The first time he made any statement whatsoever indicating that he might intend to drink the alcohol was at the time of the purchase of one bottle on April 15th, 1939, when he said "Haven't you the other brand. I like that better to drink than I do this" (R. p. 69), and "Well, that is all right, I can drink it. Either one will put hair on your chest" (R. p. 70). The only other time he made any statement concerning drinking the alcohol was when he returned to the store an hour and a half after the first purchase on April 15th, 1939, and made the purchase of four bottles from Maenpa, when he said: "Give me four pints of alcohol, will you? That other pint didn't last long with four or five of us drinking out of it." (R. p. 70).

He did not, nor did any one else, testify that he was intoxicated at the time of any of the purchases, or even that he had the smell of alcohol or liquor on his breath.

Obviously, except for the two sales on April 15th, 1939, the only evidence the government can rely on to show that the circumstances were such as to indicate that Johnson intended to procure the alcohol for beverage purposes is that Johnson was dressed in

working clothes which were not new, that thereby he attempted to simulate a "bum" and that on several occasions he purchased one bottle an hour, or two or more hours, after he had made a prior purchase.

As respects the clothes which Johnson wore, there is no evidence that respectable law abiding residents of Butte, Montana, particularly of the working class, were not similarly clothed. The evidence is that most of the customers of the store in question were of the working class, the bulk of them miners (R. pp. 160-161).

With reference to the proximity of one sale to another, it should be noted that there were about 500 customers and 200 non-customers in the store every day (R. pp. 145-7), so it cannot be assumed that appellant Dehne or the other clerks should necessarily have recognized Johnson when he made subsequent purchases, especially as he did not say anything indicating that he had made a prior purchase except as that might be inferred by his use of the word "another." Even with respect to the purchases on April 15th, 1939 (which were not made from appellant Dehne), it is submitted that the clerk might have thought he was simply joking, particularly as he obviously had not drunk any of the first bottle when he returned and bought four.

Certainly flimsy evidence such as this should not be legally sufficient to convict the appellants of the serious crimes with which they were charged, and we submit that even the jury would not have convicted the appellants except for errors committed by

the court, particularly in the admission of evidence which inferentially, at least, indicated the appellants were guilty of other crimes than those charged.

THE IMPOSITION OF SENTENCE UNDER EACH COUNT OF THE INDICTMENT CONSTITUTED DOUBLE PUNISHMENT, IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Both of the appellants were found guilty on all 22 counts of the indictment, and the trial judge imposed sentence on both of the appellants on each and every count. Counts 2 to 11 inclusive allege the sale of articles in the manufacture of which denatured alcohol was used, under circumstances from which the appellants might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, in violation of the regulation of the Commissioner of Internal Revenue. Counts 12 to 21 inclusive allege that the appellants sold articles in the manufacture of which denatured alcohol had been used, under circumstances from which they might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, and that the sales were made in containers to which there was affixed no stamp evidencing payment of all Internal Revenue taxes imposed on the articles. Count 22 alleges that the appellants possessed articles in the manufacture of which denatured alcohol was used, with the intention of selling them under circumstances from which they might reasonably deduce that it was the inten-

tion of the purchaser to procure the same for use for beverage purposes.

In order to convict under Counts 12 to 21 inclusive, it was necessary for the government to prove the sale in unstamped containers of articles in the manufacture of which denatured alcohol was used, under circumstances from which appellants might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes; and under Counts 2 to 11 inclusive, it was also necessary for the government to prove the sale of articles in the manufacture of which denatured alcohol was used, under circumstances from which the appellants might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes. The record shows conclusively that the sales alleged in Counts 2 to 11 inclusive were the same sales alleged in Counts 12 to 21 inclusive. In order to convict under Count 22, it was only necessary to prove possession of the same articles which it is alleged were sold by the appellants, and that the sales were made under circumstances from which they might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes.

It has been held that the Fifth Amendment applies to double punishment for the same offense as well as to subsequent prosecutions for the same offense for which a defendant has been theretofore tried.

In the case of *United States v. Levinson,* 54 Fed. (2d) 363, appellants had been convicted on one count

charging transportation of liquor, and on another count charging possession of the same liquor. The sentence on the count charging transportation had been suspended, and the defendant sentenced to pay a fine under the count charging possession. The court held that this was reversible error, stating (p. 363):

> "The court erroneously imposed a fine of $400 on the third count" (the one charging possession) "when it retained jurisdiction to sentence for transportation. It could not do both. It was the possession in the truck that resulted in the conviction for transportation from the boat to the truck. Schroeder v. United States, 7 Fed. (2d) 60 (C.C.A. 2); United States v. Rubin, 49 Fed. (2d) 273 (C.C.A. 2). While sentence remained suspended on the second count, the transportation, it left with the court the power to sentence on that count which, if done, would impose a double punishment since the two counts, the second and third, charged but a single offense."

In the case of *Tritico v. United States,* 4 Fed. (2d) 664, the appellants were convicted on three counts, the first of which alleged unlawful possession of liquor, the second, possession of property designed for the manufacture of liquor, and the other, unlawful manufacture. The court held that the sentence under all three counts was in violation of the Fifth Amendment, stating (p. 665):

> "* * * the third count is the only one which should have been considered when passing sentence because the manufacture therein charged includes the possession of liquor charged in the first count and the possession of distillery apparatus charged in the second count.

Under the Fifth Amendment one may not for the same offense be twice put in jeopardy. The test of what is the same offense is stated by Mr. Bishop to be 'whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second cannot be maintained; when there could not, it can be.' " (Citing cases).

"In several of the above cases the Supreme Court cites with approval Morey v. Commonwealth, 108 Mass. 433, in which it is said:
'A conviction or acquittal upon one indictment is no bar to a subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.'

In the Neilsen case, supra, it is said:
'Where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.'

Applying this well-established rule to the indictment in this case, it must be apparent at once that proof of possession of distillery apparatus would necessarily have to be included in order to prove the manufacture of liquor, because such

manufacture would otherwise be impossible. Likewise the same evidence which proved manufacture of liquor proved possession of it, because, upon the manufacture being completed, the liquor necessarily came into the control or possession of the manufacturer. *It can make no difference whether separate charges are tried together or at different times.* If the defendants had been tried for manufacturing liquor, they could not afterwards have been prosecuted for possessing the apparatus necessary for such manufacture or for possessing the liquor so manufactured. It is true that evidence of possession of apparatus would not be required to prove possession of liquor, and vice versa, so that convictions could be had upon both the first and second counts. It is likewise true that a conviction under either the first or second count would not prevent a conviction under the third count, because proof of manufacture requires additional evidence. But these results do not militate against the conclusion that a conviction under the third count for manufacture would bar a prosecution under the first or the second count for unlawful possession of apparatus or liquor. Reynolds v. United States (C.C.A.) 280 F. 1; Morgan v. United States (C.C.A.) 294 F. 82.

The conclusion is that the sentence is excessive." (Italics ours).

See also:

Ex parte Neilsen, 33 L. Ed. 118, 131 U.S. 176, 9 Sup. Ct. 672;

United States v. Crushiata, 59 Fed. (2d) 1007;

Krench v. United States, 42 Fed. (2d) 354;

Goetz v. United States, 39 Fed. (2d) 903;

Bertsch v. Snook, 36 Fed. (2d) 155;
Woods v. United States, 26 Fed. (2d) 63;
Cain v. United States, 19 Fed. (2d) 472;
Diaz v. United States, 15 Fed. (2d) 369;
Gray v. United States, 14 Fed. (2d) 366;
Friedman v. United States, 13 Fed. (2d) 632;
Dexter v. United States, 12 Fed. (2d) 777;
Rouda v. United States, 10 Fed. (2d) 916;
Green v. United States, 8 Fed. (2d) 140;
Schechter v. United States, 7 Fed. (2d) 881;
Patrilo v. United States, 7 Fed. (2d) 804;
Schroeder v. United States, 7 Fed. (2d) 60;
Morgan v. United States, 294 Fed. 82;
Reynolds v. United States, 280 Fed. 1;
Braden v. United States, 270 Fed. 441, at 444.

As stated above, the evidence which was necessary to convict under the counts alleging sales in unstamped containers was sufficient to convict under the counts alleging the violation of the regulation of the commissioner, and under the last count alleging possession. If the evidence under one count is sufficient to convict under another count, punishment of the defendant under both counts is double punishment, in violation of the Fifth Amendment. It is not necessary that each count require identical evidence.

In the case of *Reynolds v. United States,* supra, the defendant had been convicted under an indictment, one count of which charged unlawful possession and manufacture of liquor, and another the possession of the implements and materials designed for the

manufacture of liquor. The conviction was reversed, the court stating (p. 4):

> "We do not understand it necessary to double punishment that each offense contain an element not found in the other."

In the case of *Krench v. United States,* supra, the appellant was convicted under an indictment containing three counts, the first of which charged the bringing of merchandise into the country, in violation of a tariff act, the second, concealment of merchandise after it had been brought in, in violation of the act, and the third, conspiracy to import and bring merchandise into the country, in violation of the same act. It appeared that he did not actually bring the merchandise into the country but only procured others to do so, and for that reason only was found guilty on the first count. The court held that he could not be convicted on all counts, and said (p. 356):

> "He might have been proved guilty of the conspiracy but not of the substantive offense. It is clear, though, that the proof of the substantive offense included every element of the conspiracy. If he had been indicted and convicted as a principal because he procured others to commit the act charged in the first count, we cannot doubt that to punish him for the same act proved by the same evidence under a second indictment would be double punishment. This was the test laid down in Reynolds v. United States, 280 Fed. 1 (6 C.C.A.) where this court reviewed many authorities and held that although it is competent for Congress to create separate and distinct offenses growing out of the same transaction, where

> it is necessary in proving one offense to prove every essential element of another growing out of the same act, a conviction of the former is a bar to a prosecution for the latter. Cf. Reynolds v. United States, 282 Fed. 256 (6 C.C.A.); Miller v. United States, 300 Fed. 529 (6 C.C.A.); Tritico v. United States (C.C.A.) 4 Fed. (2d) 464; Rouda, et al. v. United States (C.C.A.) 10 Fed. (2d) 916; Gatti v. United States, 35 Fed. (2d) 959 (6 C.C.A.).
>
> The facts which the government was forced to rely upon in this case to prove the substantive offense charged in the first count also proved the offense charged in the third count, and in our opinion it is double punishment to pass sentence upon appellant on both counts."

In the case of *Cain v. United States,* supra, the indictment contained two counts, one of which alleged that the defendant did "deal in, dispense, sell and distribute" (morphine) "to one Draper," and the second, that he "did knowingly send" (morphine) "to said Draper." It appeared that there was only one shipment of morphine to Draper. The court said (pp. 475-476):

> "We think the true rule deducible both from the cases and the reason of the thing is 'that where, as in this case, a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.' In re Neilsen, 131 U.S. loc. cit. 188, 9 S.Ct. 676, 33 L.Ed. 118. In the above excerpt the Supreme Court obviously used the word incidents in the same sense

> as the word elements. So assuming, the Neilsen case is squarely in point with the situation here presented. * * *
>
> Obviously, and bearing upon the question already discussed, there can be no better proof of the existence of double jeopardy than the fact that an acquittal on one count of an indictment and a conviction on another inevitably brings about a contradiction on the face of the verdict. Singleton v. United States (C.C.A.), 294 Fed. 890. We think the trial court should of its own motion have required the government to elect at the close of the evidence; or that the jury should have been charged that if they found defendant guilty on either count, they should acquit him on the other."

In the case of *Rouda v. United States,* supra, the defendant's conviction on two separate counts—one for manufacturing and the other for possessing liquor—was set aside, the court stating (p. 918):

> "The conviction upon the possession count was, however, irregular, since all the elements necessary to it were included in the count for manufacture."

If there is double punishment, the appellate court will set aside that portion of the judgment which imposes double punishment, even if the question is not presented by the appellant. In the case of *Rossman v. United States,* 280 Fed. 950, the court said:

> "There is, however, another question in this case, that was not presented by counsel for plaintiff in error, either to the trial court or to this court; but, in view of the fact that it is vital to the

> defendant, we think it should be considered by this court in the disposition of this error proceeding'' (Citing cases).

The court then considered the question and reversed the conviction and sentence on three of the four counts.

As there was clearly double punishment in the imposition of the sentence under all the counts, and as the elements which had to be proved under counts 12 to 21 inclusive, namely, that the defendants sold articles in the manufacture of which denatured alcohol was used under circumstances from which they might reasonably have deduced that it was the intention of the purchaser to procure the same for use for beverage purposes, and that these sales were made in unstamped containers, would, without the addition of any other element or elements, prove the offenses charged under counts 2 to 11 inclusive and 22, the sentences on counts 2 to 11 inclusive and 22 were excessive and should be set aside.

ONLY THE PROPRIETOR OF A BUSINESS CAN BE GUILTY OF A VIOLATION OF 26 U.S.C.A. 1397(a)(1). THIS STATUTE PROVIDES THAT ANYONE WHO CARRIES ON THE BUSINESS OF A RETAIL LIQUOR DEALER WITHOUT HAVING PAID THE SPECIAL TAX REQUIRED BY LAW IS SUBJECT TO CERTAIN PENALTIES. AS APPELLANT DEHNE WAS ONLY AN EMPLOYEE OF THE PROPRIETOR OF THE BUSINESS, HE WAS NOT GUILTY OF A VIOLATION OF THIS STATUTE.

ASSIGNMENT OF ERROR VI.

The court erred in denying and overruling the motion of defendants, United Cigar-Whelan Stores Corporation, a corporation, and Edgar Dehne for a directed verdict and a verdict of acquittal and for the dismissal of the action at the close of all the evidence in the case and after the witnesses for both sides had been permanently excused, which motion was made upon the following grounds and for the following reasons:

* * * * * * *

Third, that the government has failed to prove the matters and things charged in the indictment, and in each count thereof, beyond a reasonable doubt, or by any credible evidence.

Fourth, that there is an insufficiency of the evidence introduced by the government to prove the matters and things charged in the indictment.

Fifth, that there is an insufficiency of the evidence to show that the defendants, or either of them, were guilty of the offense or offenses charged in the indictment, or in any count thereof.

* * * * * * *

The evidence is insufficient in the following particulars: The government failed to show that the de-

fendant Edgar Dehne had any proprietory interest in the business of the United Cigar-Whelan Stores Corporation, a corporation, and there is no evidence to show that said Edgar Dehne was any more than an employee of said defendant corporation. The evidence does show that Dehne was manager of the corporation's store in Butte, Montana, and that the United Cigar-Whelan Stores Corporation, a corporation, is a corporation qualified to do and doing business in the State of Montana. The evidence is insufficient and will not sustain a verdict against the defendant Edgar Dehne under count one of the indictment, which said indictment charges the defendants, United Cigar-Whelan Stores Corporation, a corporation, and Edgar Dehne with carrying on the business of a retail liquor dealer and wilfully failing to pay the special tax imposed by law.

Even assuming that there was a violation of the regulation of the Commissioner hereinabove referred to, and that therefore the special retail liquor dealers tax which was referred to in 26 U.S.C.A. 1397(a)(1) should have been paid, appellant Dehne could not be guilty of a violation of this section. As stated above, there is no question but that Dehne was an employee of United Cigar-Whelan Stores Corporation, which was the owner of the business and the proprietor of the store (R. pp. 58, 142). The pertinent portions of the statute in question read as follows:

Section 1397:

"(a) Rectifiers, liquor dealers, dealers in malt liquors, and manufacturers of stills—(1) Non-

> payment of special tax: Any person *who shall carry on the business* of a * * * retail liquor dealer without having paid the special tax as required by law shall for every such offense be fined not less than $100 nor more than $5,000 and imprisoned not less than thirty days nor more than two years * * *." (Italics ours.)

It seems clear that an employee does not "carry on the business" and is therefore not subject to the penalty set forth in the statute, and this has been held by the Circuit Court of Appeals of the Fifth Circuit in the case of *Anderson v. United States,* 30 Fed. (2d) 485. In that case the appellant had been convicted of carrying on the business of a retail liquor dealer without having paid the special tax therefor, in violation of Section 3242, Revised Statutes. The statute under which the appellant was convicted appeared in 26 U.S.C.A. 1397(a)(1) and now appears in Section 3253 of the Internal Revenue Code, in practically identical language. The appellant had requested an instruction stating, in part, that before he could be convicted, the jury must find that he participated in the carrying on of such business. The trial court refused to give this instruction and gave the following one:

> "A statute of the United States provides that one who aids or assists another in the commission of an offense, or procures the commission of an offense is guilty as a principal, just as much so as one who actually commits the offense." (Referring, obviously, to Section 550 of Title 18 of the U.S.C.A.)

The court held (p. 487):

> "Conceding arguendo that there was sufficient to go to the jury to show that Anderson" (the appellant) "was either a principal or accomplice in making the sales, it is very doubtful that there was enough to show that he was *conducting a business* without a license. One who is a *mere employee* may be guilty as an accomplice of making an illegal sale of liquor, but he cannot be an accomplice and therefore regarded as a principal in conducting a business unless he is in fact *one of the proprietors whose duty it is to pay the license tax.* U.S. v. Logan, Fed. Cas. 15,624. We think under the circumstances here disclosed the refusal of the requested charge and the giving of the above quoted portion of the general charge constituted prejudicial error." (Italics ours.)

See, also,

U. S. v. Logan, Fed. Cas. 15,624.

APPELLANT DEHNE SHOULD IN NO EVENT HAVE BEEN CONVICTED FOR MORE THAN FOUR OF THE SALES ALLEGED TO HAVE BEEN MADE.

ASSIGNMENT OF ERROR III.

The court erred in admitting evidence concerning the sale of rubbing alcohol by persons other than the defendant Dehne. The substance of such testimony given by government witness Julius Johnson is in words and figures as follows: I was next in the store at 7:25 the same evening (March 9, 1939) dressed in the same clothes and at that time Cyril Varco

was the name of the fellow that is clerking, was in there in charge. The question was then put: "What, if anything, did you say to that person?", at which time the following objection was made: "We object to the introduction of any evidence concerning any other person than Mr. Dehne, who is the person indicted in this complaint. The indictment reads 'to the defendants' throughout, which would mean Edgar Dehne and the United Cigar Store.

The Court. Overruled.

Mr. Corette. Exception.

The Court. Exception noted.

Q. All right. Now tell me what was said by you and Varco, the clerk behind the counter.

A. I walked up to the counter and I said: 'Give me a box of snuff.' He gave me the package and I paid him ten cents, and I said: 'Give me a bottle of alcohol too, will you?' And he wrapped up a bottle of rubbing alcohol and hands it to me and I walked out."

ASSIGNMENT OF ERROR VI.

The court erred in denying and overruling the motion of defendants, United Cigar-Whelan Stores Corporation, a corporation, and Edgar Dehne for a directed verdict and a verdict of acquittal and for the dismissal of the action at the close of all the evidence in the case and after the witnesses for both sides had been permanently excused, which motion was made upon the following grounds and for the following reasons:

* * * * * * *

Third, that the government has failed to prove the matters and things charged in the indictment, and in each count thereof, beyond a reasonable doubt, or by any credible evidence.

Fourth, that there is an insufficiency of the evidence introduced by the government to prove the matters and things charged in the indictment.

Fifth, that there is an insufficiency of the evidence to show that the defendants, or either of them, were guilty of the offense or offenses charged in the indictment, or in any count thereof.

* * * * * * *

The evidence is insufficient in the following particulars:

* * * * * * *

There is no evidence to show that the defendant Edgar Dehne was present in the defendant corporation's store at the time of any of the sales of rubbing alcohol as set forth in the indictment except four sales, namely, at 4:25 P.M. and 5:25 P.M. on March 9th, and 10:20 A.M. and 7 P.M. on March 10th, 1939. Therefore, the evidence will not sustain a verdict, and is insufficient against the defendant Edgar Dehne on the counts wherein other persons besides Dehne made the sales, and on any counts where the sales were made by others than Dehne for failure to have strip or stamp taxes on the bottles of rubbing alcohol. That each of the other times charged in the indictment the evidence shows other employees to have been on duty and to have made the sales.

There was no evidence whatsoever connecting appellant Dehne with any sales except four, namely, those referred to in counts 2, 3, 6, 9, and again in counts 12, 13, 16 and 19 (R. pp. 63-70). It is not even contended nor was there any evidence to show that appellant Dehne was in the store at the time of any sales except the four above referred to, and he was not the proprietor of the store. It is only necessary to state these facts to conclusively show that appellant Dehne should not have been convicted for more than four sales.

THE COURT COMMITTED ERROR IN PERMITTING THE INTRODUCTION OF TESTIMONY INDICATING AT LEAST INFERENTIALLY THAT THE APPELLANTS WERE GUILTY OF VIOLATIONS OTHER THAN THOSE SET FORTH IN THE INDICTMENTS. THE TESTIMONY IN QUESTION DID NOT COME WITHIN ANY OF THE EXCEPTIONS TO THE GENERAL RULE THAT SUCH TESTIMONY IS ORDINARILY INADMISSIBLE, AND ITS ADMISSION UNDOUBTEDLY TENDED TO CREATE PREJUDICE AGAINST THE APPELLANTS IN THE MINDS OF THE JURY.

ASSIGNMENT OF ERROR IV.

That the court erred in admitting the following portion of the testimony of government witness Roy H. Beadle:

"Q. Now, I will ask you about the first of January of this year and up until the 15th of April, what observation, if any, have you made, or what have you seen with reference to the United Cigar Store and the sale, if any, of rubbing alcohol?

Mr. Corette. To which we object on the ground and for the reason it does not tend to prove any

issue in the case, and it is incompetent, irrelevant and immaterial, and does not relate to any of the purchases alleged in the indictment, but merely to general purchases.

The Court. Overruled.

Mr. Corette. Exception noted.

Q. What have you observed, tell us.

A. Why I have observed the traffic at the United Cigar Store, people going in and out, and I have noticed the dehorns and rubbing alcohol drunkards going into the United Cigar Store at different times in my duties on the corner.

Q. And have you noticed them coming out of the store?

A. Yes, I have.

Mr. Corette. The same objection, your Honor, to this entire line of testimony.

The Court. Very well, the objection will be noted to each question.

Mr. Corette. And exception."

The general rule is that in a prosecution for a particular crime, evidence tending to show that the defendant has committed another crime wholly independent of that for which he is on trial, even though it is a crime of the same sort, is irrelevant and inadmissible. There are exceptions to this rule, and such evidence is admissible where it tends to establish a material fact in the particular offense charged or a motive therefor. It is also admissible where a specific intent is a material ingredient of the offense charged or to prove the identity of the defendant.

It is submitted, however, that in the instant case it will appear that the testimony does not come under any of the exceptions. The testimony in question was that of witness Beadle, who testified in substance that he was a police officer stationed for a part of the time on the corner on which the store in which the sales are alleged to have been made is located (R. pp. 109, 110). He said that during the period from January 1st to April 15th, 1939, he had observed "dehorns and rubbing alcohol drunkards" going into and coming out of the cigar store at different times (R. pp. 110, 111), and that he had seen them bringing out rubbing alcohol, sometimes in packages and sometimes unwrapped (R. p. 111). He also said that he had made an arrest of a man who was intoxicated and who had on his person a bottle of Weko Rubbing Alcohol which he further testified was the brand sold at the cigar store in question (R. p. 112).

This was the entire substance of this witness' testimony, and we submit that the testimony was in no way whatsoever connected with the particular offenses charged, namely, specific sales to the government agent, was clearly inadmissible, and did not come within any of the exceptions to the general rule. It should be borne in mind that the appellants were not indicted for maintaining a nuisance or for any general course of conduct, but solely for these specific sales to the government agent.

In the case of *Boyd v. United States,* 142 U. S. 450, 12 S. Ct. 292, 35 L. Ed. 1077, the defendants were

convicted of murder. The trial court admitted evidence as to several robberies committed prior to the day on which the shooting occurred and which had no necessary connection with the issue as to whether the defendants had murdered the decedent. The trial judge instructed the jury that evidence of the other crimes could be considered in passing upon the question of the identity of the defendants, but that the jury should not convict the defendants because of the commission of these other crimes. The Supreme Court held that the admission of this testimony constituted reversible error, stating ((35 L. Ed. at p. 1080):

> "But we are constrained to hold that the evidence as to the Brinson, Mode, and Hall robberies was inadmissible for the identification of the defendants, or for any other purpose whatever, and that the injury done the defendants, in that regard, was not cured by anything contained in the charge. Whether Standley robbed Brinson and Mode, and whether he and Boyd robbed Hall, were matters wholly apart from the inquiry as to the murder of Dansby. They were collateral to the issue to be tried. No notice was given by the indictment of the purpose of the government to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community,

> and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. Upon a careful scrutiny of the record we are constrained to hold that, in at least the particulars to which we have adverted, those rules were not observed at the trial below. However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged."

We believe the sole purpose and effect of the testimony of the witness Beadle was to prejudice the appellants with the jurors. Even though this witness did not testify as to the circumstances under which *any* sales were ever made by the appellants, his testimony undoubtedly produced the impression that the appellants were in the habit of selling rubbing alcohol to depraved persons, for illegitimate uses. Again bearing in mind that the appellants were charged only with specific sales to one person, and not with a general course of conduct, this testimony did not in the slightest particular tend to prove any of the issues of the case. It certainly had no logical connection whatsoever with the alleged offenses for which the appellants were on trial and, on the authority of the *Boyd* cases and other cases to which we will refer, was clearly inadmissible. Its harmful effect becomes more apparent when we realize that the only competent evidence of sales which the government introduced dealt with specific sales to the government agent who, we assume the United States Attorney will concede, appeared to be a decent, law-abiding citizen.

In the case of *People v. Girotti,* 67 Cal. App. 399, 227 Pac. 936, the defendant had been indicted for an unlawful sale of liquor. For the purpose of impeaching one of the *People's* witnesses, he introduced into evidence an affidavit used in another action. The district attorney then introduced into evidence the complaint in the other action which charged the unlawful possession of liquor and that the use of the building in question constituted a nuisance. The court held (227 Pac. at p. 937):

> "The admission of the complaint was in violation of the rule that one crime cannot be established by proof of the commission of an independent crime. Its admission was so wide a departure from the rules of evidence and so prejudicial to the rights of the defendant that it cannot be covered by the constitutional mantle of harmless error."

In the case of *People v. Morales,* 45 Cal. App. 553, 188 Pac. 58, the defendant was charged with selling liquor on a particular day. Evidence of sales thereafter was admitted over objection. The court held (188 Pac. at p. 59):

> "Evidence of other offenses committed both before and after that charged against a defendant is sometimes admissible. The cases, however, in which such proof may be made, have been classified by the California courts.
>
> We find that such evidence is admissible when it tends to establish a material fact in the particular offense charged or a motive therefor. (Citing cases.)

> It is admissible also where a specific intent is a material ingredient of the offense charged. (Citing cases.)
>
> It is admissible also where sexual crimes are charged to prove the inclination or lascivious disposition of a defendant. (Citing cases.)
>
> The charge here involved does not fall within either classification adverted to. In fact in similar cases it has been held directly to the contrary. (Citing cases.)
>
> The errors complained of in our opinion were prejudicial to such a degree as to have deprived the defendant of a fair trial."

We submit that in the instant case the testimony in question did not tend in the slightest degree to establish a material fact in connection with the charged sales to the government agent, or a motive therefor. Also, it has been held that specific intent is not a material ingredient of the offense of selling liquor without a license or stamps.

In the case of *State v. Jackson,* 219 Wis. 13, 261 N.W. 732, the trial court allowed proof of sales other than the one charged. This was held to be reversible error, the court stating (261 N.W. at p. 734):

> "Although the defendant strenuously objected to the introduction of such testimony, the court admitted it on the theory that it was competent to show intent. Intent, however, is not an element of selling liquor without stamps or without a license. The admission of such testimony was clearly error and prejudicial if received for the purpose of proving that the defendant was guilty

of the specific charge or charges made against him." (Citing cases.)

As the crimes charged in this case are similar to those of sales of liquor, intent is not an ingredient of these crimes. Therefore, even if it were contended that the testimony in question showed any intent on the part of the appellants, it would be inadmissible.

In the case of *People v. Smith,* 64 Cal. App. 344, 221 Pac. 405, evidence of other sales than those charged was admitted. The court held (221 Pac. at p. 406):

> "While it may be that without such evidence of other sales the case made out against the defendant is strong enough to support the judgment, the great probabilities are that the evidence of other violations of the statute contributed to the verdict if such evidence was not the controlling factor in its inducement. It is a dangerous practice and one which is not in keeping with American ideals to charge a man with one offense and on his trial therefor either to prove or offer to prove that he has at other times and places committed offenses of a nature similar to the one of which he is accused."

In *Hill v. State,* 41 Okla. Crim. Rep. 266, 272 Pac. 490, the trial court allowed proof of other sales than the one charged. The appellate court held this was error, saying (272 Pac. at p. 491):

> "It is fundamental that the issue in a criminal case is single, and it is not the policy of the law to convict an accused of one crime by showing that at some other time he was guilty of another. Where evidence of another crime tends to prove

> the specific crime charged, as where it tends to show a common scheme or plan, or where the crimes are so related to each other that proof of one tends to prove the other or to connect the defendant with the commission of the crime charged, or sheds light on the crime charged or where it tends to show motive or intent or identity, or has some logical connection with the offense charged, proof of another crime is competent."

No common scheme or plan was alleged or proved in the instant case, the sole charges being as to specific sales.

In the case of *Hughes v. State,* 51 Okla. Crim. Rep. 11, 299 Pac. 240, the court held proof of sales other than the one charged was inadmissible, stating (299 Pac. at p. 241):

> "Evidence of an offense other than the one charged is admissible only when it tends to prove the offense charged. To be competent and admissible it must have some logical connection with the offense charged."

We submit that it is obvious that the testimony of Beadle had no logical connection whatsoever with the crimes charged and did not in the slightest degree tend to prove them.

In the case of *McGee v. State,* 24 Ala. A. 124, 131 So. 248, the appellant was charged with violating the state prohibition law, the crime involving the sale of one pint of whisky. The pint in question and three others were exhibited to the jury and the prosecuting attorney was allowed to ask the defendant if he had

not sold liquor to soldiers and boys. The conviction of the defendant was reversed on appeal, the court saying (131 So. at p. 250):

> "The general and well recognized rule is that in a prosecution for a particular offense, evidence tending to show the defendant guilty of another and distinct offense disconnected with the crime charged is inadmissible; the manifest purpose of this rule being to prevent prejudice to the defendant in the minds of the jury by the introduction in evidence of offenses for which he is not indicted, to which he is not finally to answer, and building up a conviction on inferences of guilt from the fact that he had committed another offense. The justice, fairness and reason for the rule is apparent, and as said in the case of Gassenheimer v. State, 52 Ala. 313, 'a strict adherence to it is necessary to prevent criminal prosecutions from becoming instruments of oppression and injustice.' "

There should have been the desired "strict adherence" to the rule in this case to prevent the obvious prejudice to the appellants in the minds of the jury. That this prejudice was created is shown conclusively by the fact that the appellant Dehne was convicted on every count, involving ten separate sales, though the government's own testimony showed that he made and was present at only four of these ten sales, and did not show that he instructed the other clerks to make the other sales.

The case of *Coulston v. United States,* 51 Fed. (2d) 178, was a prosecution for violation of the Harrison Anti-Narcotic Act, 21 U.S.C.A. 171, et seq. The trial

court permitted testimony as to sales other than the one charged. The court held (pp. 180-181):

> "In our judgment, this was prejudicial error. The issue presented was a simple one: Did defendant negotiate the sale on January 20, 1929, as testified to by two government witnesses, or was he an innocent bystander, as he testified. These remote and disconnected transactions had no evidentiary bearing on this issue; at best they could serve but to create an atmosphere of hostility and to distract the attention of the jury from the issue. The briefs indicate a confusion of thought upon two entirely different evidentiary principles—one the admissibility of proof of other offenses; the other, the impeachment of the defendant as a witness if he takes the stand. In the civil law, and very early in the common law, evidence of other crimes was admitted on the theory that a person who has committed one crime is apt to commit another. The inference is so slight, the unfairness to the defendant so manifest, the difficulty and delay attendant upon trying several cases at one time so great, and the confusion of the jury so likely, that for more than two hundred years it has been the rule that evidence of other crimes is not admissible. Boyd v. United States, 142 U.S. 450, 12 S. Ct. 292, 35 L. Ed. 1077; Hall v. United States, 150 U.S. 76, 14 S. Ct. 22, 37 L. Ed. 1003; Niederluecke v. United States (C.C.A. 8), 21 F. (2d) 511; Cuccia v. United States (C.C.A. 5), 17 F. (2d) 86; Smith v. United States (C.C.A. 9), 10 F. (2d) 787; Wigmore on Evidence (2d Ed.), Sec. 194. Corpus Juris cites cases from forty-four American jurisdictions in support of this rule. 16 C.J. 586. There are many exceptions to the rule, the most

common of which is that, if the prosecution must show a specific intent, evidence of other similar offenses may be used to establish that fact. For example, in a prosecution for a scheme to defraud, the existence of the crime depends upon the proof of fraudulent intent; and many times the proof of that intent is found in the 'evidence of other acts and doings of the party, of a kindred character, in order to illustrate or establish his intent or motive in the particular act directly in judgment.' Wood v. United States, 41 U.S. (16 Pet.) 342, 360, 10 L. Ed. 987; Williamson v. United States, 207 U.S. 425, 28 S.Ct. 163, 52 L.Ed. 278; Wigmore on Evidence (2d Ed.) Secs. 300-373; 16 C.J. 589. All of the many so-called exceptions to the general rule of exclusion can be covered by stating the rule negatively; that is, relevant and competent evidence of guilt is not rendered inadmissible because it also proves that defendant committed another offense. Moore v. United States, 150 U.S. 57, 61, 14 S.Ct. 26, 37 L. Ed. 996; Tucker v. United States (C.C.A. 6), 224 F. 833; Hogan v. United States (C.C.A. 5), 48 F. (2d) 516; Miller v. United States (C.C.A. 9), 47 F. (2d) 120. Or, to use the language of Justice Brewer, 'A party cannot, by multiplying his crimes, diminish the volume of competent testimony against him.' State v. Adams, 20 Kan. 311, 319.

The government was not obligated to show any specific intent in the case at bar. In Paris v. United States (C.C.A. 8), 260 F. 529, the defendants were charged with a violation of the Anti-Narcotic Act, and the cause was reversed because evidence of other violations of the act was admitted, the court holding that 'the intent of the

> defendants, or either of them, was not an essential element of the offense with which they were charged in the case at bar.' The evidence offered by the government in this case had no probative bearing on the guilt of the defendant, and should have been excluded."

The case of *Grantello v. United States,* 3 Fed. (2d) 117, was also for a violation of the Harrison Anti-Narcotic Act. The trial court permitted the introduction of testimony showing other sales than those charged, these other sales being made at about the same time as the ones charged. The court held that the admission of this testimony was reversible error, stating (p. 119):

> "* * * He was not charged in the indictment with any of the sales, possessions, or offenses about which Gunderson and Prewitt testified, nor was he on trial for any thereof. They were in no way connected with any of the offenses charged in the indictment, and no question of the intent of the defendant was material or in issue in this case. It is neither competent, fair, nor just to a defendant to receive evidence against him of like offenses to those charged in the indictment under which he is on trial, where no question of his intent is in issue, and no connection between such offenses and those charged is proved. Marshall v. United States, 197 F. 511, 513, 515, 117 C.C.A. 65; Scheinberg v. United States, 213 F. 757, 760, 130 C.C.A. 271, Ann. Cas. 1914D, 1258; Fish v. United States, 215 F. 544, 551, 552, 132 C.C.A. 56, L.R.A. 1915A, 809."

See also:

People v. Garrett, 93 Cal. App. 77, 268 Pac. 1071;

People v. Mori, 67 Cal. App. 442, 227 Pac. 629;

People v. Wilson, 19 Cal. App. (2d) 340, 65 Pac. (2d) 834;

Hall v. Commonwealth, 241 Ky. 72, 43 S.W. (2d) 346;

Wimpling v. State, 171 Md. 362, 189 Atl. 248;

State v. Maddox, 339 Mo. 840, 98 S.W. (2d) 535;

People v. Johnson, 197 N.Y. Supp. 379;

State v. Beam, 179 N. Car. 768, 103 S.E. 370;

Burke v. State, 135 Tex. Crim. App. Rep. 296, 120 S.W. (2d) 95;

Coleman v. State, 123 Tex. Crim. App. Rep. 621, 57 S.W. (2d) 162;

Grohoske v. State, 121 Tex. Crim. App. Rep. 352, 50 S.W. (2d) 310;

Alexander v. State, 24 Okla. Crim. Rep. 435, 218 Pac. 543.

CONCLUSION.

We have shown that there was no violation of the regulation in question, and therefore the appellants should not have been convicted on any of the counts of the indictment. We believe it is obvious that the court committed error in the admission of testimony, and that this error is the sole cause of the verdict of

the jury. The prejudice caused by the testimony in question is conclusively shown by the fact that the jury convicted appellant Dehne for sales in which he was in no way involved.

Even if there had been competent testimony, the sentences imposed on the defendants were excessive. We respectfully submit that the judgment should be reversed.

Dated, San Francisco, California,
February 26, 1940.

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